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No. 79-1888

In the Supreme Court of the United States

OCTOBER TERM, 1979

ORION RESEARCH, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that a district court may not grant summary judgment for a government agency pursuant to Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4),[1] solely on the basis of an in camera inspection of the requested documents.

1. In this Freedom of Information Act (FOIA) suit, petitioner seeks to compel disclosure by the Environmental Protection Agency (EPA) of documents concerning the solicitation and award of a contract to one of petitioner's competitors. Petitioner submitted a

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[1] 5 U.S.C. 552(b)(4) provides in pertinent part:

> This section does not apply to matters that are—
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]

technical contract proposal in response to an invitation for bids from EPA. Thirteen proposals were submitted, but only three were deemed to be in the competitive range (Pet. App. 5). Those three firms, including petitioner, were requested to submit revised proposals prior to a final contract determination. The contract was awarded to Meloy Laboratories, Inc., after petitioner's proposal was found to be technically unacceptable (Pet. App. 6).

Pursuant to the FOIA, petitioner requested copies of the Meloy Technical Proposal, the plan used by EPA to evaluate proposals, and several intra-agency memoranda. EPA produced the evaluation plan, but denied the other requests, citing Exemptions 4 and 5 of the FOIA, 5 U.S.C. 552(b)(4), (b)(5) (Pet. App. 6-11).

Petitioner brought suit in the United States District Court for the District of Massachusetts to compel production of the withheld documents. The district court, after examining the documents and an accompanying index and affidavit submitted by EPA, determined that certain documents or portions of documents should be produced (Pet. App. 28-29). However, it granted EPA's motion for summary judgment with regard to the remaining documents. Specifically, the court held that the Meloy Technical Proposal need not be disclosed under Exemption 4 because compelled disclosure of technical proposals of this nature would have a chilling effect on EPA's ability to elicit "candid and original bids" (Pet. App. 19-22). Certain intra-agency memoranda were also held to be exempt under Exemption 5 (Pet. App. 22-27).

On appeal, petitioner contended that EPA had not produced sufficient evidence to warrant summary judgment in its favor. The court of appeals rejected the

claim, holding (Pet. App. 4a)[2] that (1) the affidavit of the director of EPA's Contract Management Division, (2) the detailed index describing the contents of the documents at issue and the reasons for particular exemption claims, and (3) the district court's in camera inspection of the documents provided a sufficient basis for the district court's determination that EPA had validly claimed an exemption for the documents. In affirming the decision upholding the Exemption 4 claim, the court of appeals explained (Pet. App. 6a) that it was not holding that "the mere conclusory say-so of an agency that its ability to acquire information would be impaired will suffice." Rather, the court held only that "where the [agency's] conclusion is plausibly supported in some detail, as it is here by the continuing need for eliciting ideas of both a technical and novel nature, we will not require more" (*ibid.*).

2. The court of appeals held that, on the facts of this case, the district court correctly granted summary judgment sustaining EPA's exemption claim for several specific documents. This narrow ruling does not warrant further review.[3]

Petitioner acknowledges (Pet. 12-13) that the established construction of Exemption 4 permits agency withholding of information where disclosure is likely, *inter alia*, "to impair the Government's ability to obtain necessary information in the future." *National Parks and*

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[2]The opinion of the court of appeals as reproduced in the appendix to the petition has page numbers that are not consecutive to those of the preceding appendix pages. We have added "a" following page references to that opinion to distinguish them from the first 29 pages of the appendix.

[3]Only the Exemption 4 determination is at issue here. Petitioner does not challenge the court of appeals' decision with respect to the application of Exemption 5 to certain intra-agency memoranda (see Pet. 7 n.2).

Conservation Ass'n v. *Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974). It contends, however, that it was error to uphold the EPA exemption claim on that ground because the district court found the agency official's affidavit deficient in some respects (Pet. 14-15), because the court thereupon based its determination solely on an in camera inspection of the documents (allegedly an error in any case involving Exemption 4) (Pet. 19-21), and because the insufficiency of EPA's affidavit and petitioner's inability "to view the documents" denied petitioner an adequate opportunity to "present its case effectively" (Pet. 21). These arguments are insubstantial.

The district court found that the affidavit's deficiencies made it inadequate, standing alone, to support EPA's motion for summary judgment. But the court of appeals, which made its own review of the affidavit (Pet. App. 4a), properly concluded that the affidavit, considered together with the documents at issue and with EPA's detailed index linking portions of the documents to particular exemption claims, did furnish an adequate basis for the district court's entry of summary judgment. The Exemption 4 determination thus does not rest "solely" on in camera inspection, as petitioner contends (Pet. 20).

Petitioner's suggestion (Pet. 21) that decisions upholding Exemption 4 claims may never be based on in camera inspection is frivolous. Congress added the provision in 5 U.S.C. 552(a)(4)(B) authorizing courts to "examine the contents of * * * agency records *in camera*" precisely because it saw this as a way of piercing conclusory agency claims (see H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 7 (1974)), and courts customarily utilize in camera inspection when affidavits alone do not permit conclusive resolution of agency exemption claims. See, *e.g.*, *Baker* v. *CIA*, 580 F. 2d 664, 669 (D.C. Cir. 1978);

Maroscia v. *Levi*, 569 F. 2d 1000, 1003 (7th Cir. 1977); *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F. 2d 1139, 1143 (9th Cir. 1976). The court of appeals recognized (Pet. App. 6a), of course, that in some Exemption 4 cases a record of the sort relied on here would be insufficient to warrant summary judgment granting the exemption. But the district court's conclusion in this case (Pet. App. 20-22)—that the ability of an agency that is seeking innovative technology to receive "candid and original bids" would likely be impaired if original ideas contained in the bids were disclosed to competing bidders—hardly amounts to the type of technical judgment that might require an evidentiary hearing.[4]

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[4]In *National Association of Government Employees* v. *Campbell*, 593 F. 2d 1023 (D.C. Cir. 1978), on which petitioner relies (Pet. 23), the court was primarily concerned with the district court's resolution, on the basis of affidavits, of a dispute concerning the agency's attempt to show that disclosure of insurance carriers' proposals for health insurance plans would result in competitive harm. The significance of innovation in the field of insurance is much more problematic than its significance in the area of new technology. Moreover, as the court of appeals in the present case observed (Pet. App. 5a-6a), an "agency is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information." An agency can less readily determine from its own experience whether competitors will actually be harmed by disclosures.

Petitioner's reliance (Pet. 17) on *Shermco Industries, Inc.* v. *Secretary of the Air Force*, 452 F. Supp. 306, 323-324 (N.D. Tex. 1978), is similarly misplaced. The Exemption 4 issue in that case concerned bidders' cost proposals that the Air Force maintained were confidential prior to the award of a contract. The district court's holding that they were not exempt because the contract in question had in fact been awarded (452 F. Supp. at 323-324) was reversed by the court of appeals, which held that no final contract award had been made. The court of appeals did not confront the question whether the Air Force could withhold bid proposals after the award had been made. 613 F. 2d 1314, 1316-1318 & n.7 (5th Cir. 1980).

Finally, there is no merit to petitioner's contention that the in camera inspection procedure followed by the district court deprived petitioner of an adequate opportunity to rebut EPA's submission in support of its Exemption 4 claims. Courts have recognized that FOIA plaintiffs are handicapped by their inability to see contested agency records, but an accepted means of alleviating the problem is to require the agency to submit an index describing the nature and contents of each document and correlating exemption claims with particular documents or parts thereof. *Irons* v. *Bell*, 596 F. 2d 468, 476 (1st Cir. 1979); *Mead Data Central, Inc.* v. *United States Dept. of the Air Force*, 566 F. 2d 242, 260-262 (D.C. Cir. 1977); *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As the court of appeals noted (Pet. App. 3a-4a), such an index was supplied in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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